No. 85-1280

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL B. and his parents MR. AND MRS. B.,

Petitioners,

VS.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on October 24, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on October 24, 1985 and is set forth in the appendix, App. 1-11. The decision of the United States District Court for the Eastern District of Wisconsin, Judge Terence T. Evans, presiding, was entered on July 27, 1984 and is set forth in the appendix, App. 12-27.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are the parents of a handicap child and/or a handicap child entitled to either the appointment of counsel or attorneys' fees to employ counsel in order to prosecute claims of violation of 20 U.S.C. § 1401, *et seq.* as a matter of equal protection and due process of law?

2. Did the Court of Appeals for the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin err in holding that the Complaint filed by the plaintiffs-appellants-petitioners failed to adequately set forth a cause of action or justifiable controversy under 20 U.S.C. § 1401, *et seq.*?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves 20 U.S.C. § 1401, *et seq.* and the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The petitioners are the parents of a handicap child and an emotionally disturbed and handicap child who filed a Complaint in the United States District Court for the Eastern District of Wisconsin in 1983 alleging various violations by the Wisconsin Department of Public Instruction and various subsidiaries thereof and responsible individuals claiming that the handicap child had been improperly placed and denied a free and appropriate and adequate education and that petitioners' collective constitutional rights to due process of law and equal protection had been violated when they attempted to redress their grievances administratively

and that the defendants had made intentional misrepresentations to the petitioners, been negligent, and intentionally inflicted emotional distress upon the handicap child and that the actions of the defendants had been in bad faith. The petitioners requested injunctive and declaratory relief as well as compensatory and punitive damages. Some of the claims asserted by the petitioners were dismissed upon motion of the defendants and the remaining claims were denied after evidentiary hearing. The Court of Appeals affirmed the decision of the trial court for the reasons set forth in the opinion and rejected the assertion that the petitioners should be entitled to equivalent legal assistance as that provided to the defendants-appellees by reason of financial resources derived from tax base revenues.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS SHOULD BE ENTITLED TO COUNSEL OR PAYMENT OF ATTORNEYS' FEES AS A MATTER OF EQUAL PROTECTION AND DUE PROCESS OF LAW.

The case at bar raises a question heretofore not raised or addressed by the United States Supreme Court, i.e., whether the Fifth Amendment to the United States Constitution compels that parents of handicap children be furnished counsel to pursue claims against responsible agencies under 20 U.S.C. § 1401, *et seq.*

The issue as raised is one of fundamental fairness and constitutional equality. It is respectfully submitted that the Court of Appeals for the Seventh Circuit erroneously distinguished the authority presented by the appellants as "case law governing indigent criminal defendants who face the possibility of incarceration." See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Powell v. Alabama*, 287 U.S. 45 (1932).

Such a facile rationale ignored the language of the Fifth Amendment which by its express terms prohibits deprivation of property or life without due process of law as well as liberty and further ignored the historic circumstances in the case at bar.

The petitioners had been required for 11 years, all through the administrative process, to present their case without counsel while the opponents were furnished the luxury of unlimited resources from tax coffers to pay for the services of the best attorneys available within the system. Plaintiffs were able to muster sufficient financial resources to obtain counsel for purposes of filing the

initial Complaint in the United States District Court for the Eastern District of Wisconsin but again were obliged to present their appeals without counsel. And, again on appeal the defendants had unlimited resources with respect to counsel.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT AS TO THE SUFFICIENCY OF THE COMPLAINT AND THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BASED THEIR OPINION ON THE FACT THAT THE PETITIONERS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDY AND IT IS A MATTER OF FACT AND RECORD THAT THE PETITIONERS DID EXHAUST BUT IT BECOMES SELF-EVIDENT THAT THE MATERIAL SUBMITTED WAS NOT READ.

The Court of Appeals' opinion sets forth the claims asserted by the petitioners in accurate detail but erroneously concludes that the Complaint did not allow a sufficient predicate to entitle the petitioners to trial on any of the issues. It may well be that the Handicap Children's Act, 20 U.S.C. § 1401, *et seq.* is nothing more than empty rhetoric and that under *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981) and *Smith v. Robinson*, 104 S.Ct. 34, 57 (1984) there is no meaningful relief available in reality to persons aggrieved. It is respectfully submitted, however, that those decisions were not intended to totally emasculate the act and this Honorable Court should take this opportunity to give the act meaning and vitality. The United States District Court and the United States Court of Appeals for the Seventh Circuit based their opinion on the fact that the

petitioners have not exhausted their administrative remedy and it is a matter of fact and record that the petitioners did exhaust but it becomes self-evident that the material submitted was not read.

CONCLUSION

For the foregoing reasons certiorari should be granted and the Order of the United States Court of Appeals for the Seventh Circuit dated October 24, 1985 should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(SUBMITTED AUGUST 6, 1985)*
October 24, 1985
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

No. 84-2432

DANIEL B. and his parents
Mr. and Mrs. B., Plaintiffs-Appellants,

vs.

WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION, et al., Defendants-Appellees,

Appeal from the United States District Court
for the Eastern District of Wisconsin
No.83-C-1534.
Terence T. Evans, *Judge*.

ORDER

This appeal concerns a district court determination under the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1401 *et seq.*, that the educational placements offered to appellant Daniel B.[1] were appropriate and that other claims brought by Daniel

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*Both parties have stipulated that oral argument is not being requested in this case.

[1] The full name of the plaintiffs-appellants is omitted at their request to protect their privacy.

and his parents did not state adequate causes of action. For the reasons discussed below, we affirm.

I.

Daniel B. was born in 1969; he is an emotionally disturbed and handicapped child and was so identified by the Glendale-River Hills School District (District 1), the district responsible for his education beginning in school year 1976. Named as defendants in the action instituted by Daniel's parents are the Wisconsin Department of Public Instruction, (DPI), the Wisconsin Superintendent of Public Instruction, District 1's Board of Education and Superintendent, and the Case Manager, Director of Special Education, and teacher responsible for Daniel's education.

Daniel was initially enrolled in a private special education facility, Highland Bluff School in Mequon, Wisconsin, in 1975. His parents claim that he progressed well there, both emotionally and educationally. In 1976, he was enrolled in District 1's public school system because, his parents maintain, the district's Superintendent, defendant John Belton, assured them that District 1 had the facilities and personnel to provide an individual educational program suited to Daniel's needs. In their complaint, Mr. and Mrs. B. allege that from 1976 through 1982 Daniel's education was mishandled by defendants. Specifically, they allege that the defendants failed to properly diagnose Daniel's disability, that they moved him "from one inappropriate facility to another," and that they subjected him to physical and emotional abuse, neglecting his educational needs to the point that Daniel "has regressed to a state of semi-autism, become a recluse, and developed physical deformation of his feet and hands."

Plaintiffs' amended complaint set out six separate causes of action. The counts allege the following violations:

I That a hearing concerning educational plans for Daniel during the 1982-83 school year, held under the authority of Wis. Stats. Ch. 115, was defective in that Daniel's parents were refused legal counsel and were required to furnish legal briefs, in violation of Wis. Stats. § 115.81. In addition, the decision of the hearing officer (that the proposed plans were inappropriate) was reversed on appeal by the Wisconsin Superintendent of Public Instruction, defendant Herbert Grover, in an untimely manner and in a decision that was "erroneous, arbitrary and capricious and contrary to the facts and the law."

II That during the years from 1976 through 1981, District 1's Board of Education, Superintendent and the Case Manager and Principal concerned in Daniel's education denied Daniel a free, appropriate, and adequate remedial education, in violation of 20 U.S.C. § 1401 *et seq.* and Wis. Stats. Ch. 115.

III That the same defendants listed above violated the plaintiffs' constitutional rights to due process of law and equal protection of the law, in violation of 42 U.S.C. § 1983.

IV That the actions of District 1, its Board, and its staff constituted intentional misrepresentation to Daniel's parents and negligent and intentional infliction of emotional distress to Daniel.

V That District 1's Superintendent Belton disclosed confidential material and information about the

identity of Daniel and the nature of his handicap to unauthorized persons, in violation of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232 *et seq.* and Wis. Stats. § 895.50.

VI That from 1976 through 1981, the actions of Superintendent Belton and of Daniel's teacher constituted "egregious and bad faith failure to afford Daniel the procedural safeguards of federal and state law."

Plaintiffs requested injunctive and declaratory relief with respect to Counts I and II, and compensatory and punitive damages with respect to Count III ($8,000,000.00), Count IV ($11,000,000.00), Count V ($1,000,000.00) and Count VI ($5,000,000.00), along with costs and reasonable attorneys' fees.

Defendants filed a motion to dismiss all of the complaint except Count I, and in March 1984 this motion was granted by the district court. *Daniel B. v. Wisconsin Department of Public Instruction*, 581 F. Supp. 585 (E.D. Wis. 1984). Following an evidentiary hearing on Count I, the district court determined that the placement recommendations proposed for Daniel's 1982-83 education were appropriate and entered judgment for the defendants. On appeal, the plaintiffs challenge the dismissal of Counts II through VI and assert that the ruling on Count I was in error and was flawed by further violations of their rights to due process and access to the courts.

II.

We will first address the district court's dismissal of Counts II through VI. Count II, which requested declaratory relief for the school years 1975-76 through 1980-81, was dismissed by the district court because there

had not been complete administrative review of the issues. *Daniel B.*, 581 F. Supp. at 588 (citing to *Riley v. Ambach*, 668 F.2d 635 (2d Cir. 1981) and 20 U.S.C. § 1415(e)(2)). On appeal, plaintiffs assert that their case justifies the relief under one or both of the two examples given in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), of extraordinary circumstances in which monetary damages may be awarded in an EAHCA action. *Anderson*, however, concerns the award of compensatory damages to parents for monies expended by them in providing appropriate alternative placement for a child who has not been properly assessed by the school district. It does not address declaratory relief for prior violations of the EAHCA, the only relief requested by plaintiffs, and it contains nothing to show how or why the preliminary requirement of administrative exhaustion is to be bypassed. Indeed, one of the reasons given for the propriety of damages in *Anderson* is the length of time the parents must wait in order to fulfill their duty to exhaust all avenues of administrative review. *Id.* at 1213. The requirement of administrative exhaustion has been fully recognized by this court, *Timms v. Metropolitan School District*, 722 F.2d 1310, 1316 (7th Cir. 1983), and plaintiffs present no convincing argument to establish that efforts to obtain administrative review would have been futile in this case.

Count III, alleging deprivation of constitutional rights in violation of 42 U.S.C. § 1983, also relates to this court's decision in *Anderson*. In that case we ruled that the right to relief for violations of the EAHCA is provided exclusively within the Act. 658 F.2d at 1216-17. That position was reiterated in *Doe v. Kroger*, 710 F.2d 1209 (7th Cir. 1983), where we held that the EAHCA exclusively "meets all a parent's needs to assure their children receipt of the benefits of the Act" whether the

challenges are to the provision of services or to the procedures used in making determination under the Act. *Id.* at 1212-13. *See also, Smith v. Robinson*, 104 S. Ct. 3457 (1984). Consequently, the cause of action based on § 1983 was properly dismissed.

Count IV and most of Count V sought monetary damages for causes of action based on Wisconsin state law — intentional misrepresentation, negligent and intentional infliction of emotional distress, and invasion of privacy. The district court declined to exercise pendant jurisdiction over these claims, relying on *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). 585 F.2d at 591-92. In light of the reasons given by the district court for this descision, we cannot say that that was an abuse of the court's discretion. *See Moor v. County of Alameda*, 411 U.S. 693, 712 (1973); *Gibbs*, 383 U.S. at 726; *Smith v. Galesburg Crown Finance Corp.*, 615 F.2d 407, 422 (7th Cir. 1980).

The portion of Count V not raising an issue of state law alleged that District 1 and its officers, specifically Superintendent Belton, violated the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232 *et seq.* The district court properly dismissed this count because that Act does not provide a private damage remedy and the only relief requested in Count V was a total of one million dollars in damages. Plaintiffs do not dispute this ruling with any particularized argument on appeal.

Count VI, alleging "egregious and bad faith failure to afford Daniel the procedural safeguards of federal and state law," was viewed by the district court as a claim for money damages arising out of a violation of the EAHCA. The count was dismissed because, with only a few recognized exceptions, the Act does not provide for

monetary damages in actions brought under § 615(e)(2), 20 U.S.C. § 1415(e)(2). On appeal, plaintiffs contend that their case meets either or both of the exceptions to this rule recognized in *Anderson*. The *Anderson* exceptions involve situations 1) where the placement designed by the state agency posed such "a serious risk of injury to that child's physical health" that the parents were forced to seek and pay for alternative arrangements, and 2) where the defendants acted in bad faith by egregiously failing to comply with the procedures of the EAHCA. 658 F.2d at 1214.

Any claims to which the first *Anderson* exception would relate involve Daniel's placement prior to the 1982-83 school year. Daniel was placed by his parents in St. Mary's Hill Hospital from September 1979 to July 1980. A state action based on the parents' efforts to have the district assume the cost of this hospitalization was dismissed because the parents had failed to exhaust administrative remedies. This same failure of administrative exhaustion prevents prosecution of the issue under the EAHCA, as explained in connection with Count II.

With respect to the second exception recognized in *Anderson* — bad faith on the part of the defendants shown by their allegedly egregious failure to comply with EAHCA procedures — we agree with the district court that the cited examples of actions claimed to demonstrate bad faith do not justify the award of money damages. Plaintiffs place their greatest reliance on a report issued by the Office of Civil Rights (OCR) of the United States Department of Education as "proving" that the defendants acted in bad faith. The report, issued after an investigation made in response to a complaint from Daniel's parents, indicated that the district had failed to adequately and properly evaluate Daniel's needs prior to

June 1981 but that it had been in compliance with evaluation criteria thereafter. The OCR also determined that failure to convene an M-team within a reasonable time after the parents' request in 1979 was a violation of § 504 of the Act, 34 C.F.R. § 104.35. These findings, however, do not establish that the district's actions were taken in bad faith, and the full OCR investigative report indicates a number of charges, including charges that Mr. and Mrs. B. were denied procedural protections of the Act, that were determined by OCR to be without factual support. At the time of the final OCR report, December 1983, the district was reported to be in compliance with all relevant regulatory standards. Plaintiffs argue on appeal that they are entitled to money damages for the violations of § 504 found by the OCR. It is not clear that this was an argument fully presented to the district court but, in any event, the only violations of that provision for which the OCR report could provide supporting evidence occurred prior to 1982, a time when the plaintiffs failed to exhaust administrative remedies. Therefore, the OCR report does not support the award of money damages through either an imnplied right of action under § 504 or under the *Anderson* "bad faith" exception to action brought under § 615(e)(2).[2]

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[2] In addition to the reasons stated above, this Court's discussion of the second "exceptional circumstance" (bad faith on the part of the state) in *Anderson* indicates that an award of money damages may be appropriate only to parents who had had to arrange and pay for alternative placement for a period of time while administrative and judicial relief was being sought. This implication of this discussion is that the monetary damages would be to compensate for the costs of such placement. On Count VI, the plaintiffs were requesting a total of five million dollars in damages.

III.

In a decision issued July 27, 1984, after an evidentiary hearing on Count I of plaintiffs' complaint, the district court entered judgment for the defendants and dismissed this final remaining count. The court held that the five placements offered by the district for Daniel's education for the 1982-83 school year were appropriate under the standards set out in *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982). The district court's opinion thoroughly considered the applicable facts and legal standards, and we affirm and adopt that opinion as the decision of this court's decision regarding the charges encompassed in Count I.

IV.

In their final argument on appeal, plaintiffs assert that the procedures used by the district court in its resolution of Count I deprived them of their constitutional rights to due process of law and access to the courts. Their presentation of the issue covers many events not directly connected to the procedures employed by the district court, such as defendants' decision to hire a private law firm and the behavior of attorneys for the state and local defendants outside the courtroom. However, the relevant portion of their claim appears to focus on the court's failure to require testimony from Dr. Grover, Superintendent of the Wisconsin Department of Public Instruction, and its refusal to provide free legal counsel for the plaintiffs.

Failure to require testimony from Dr. Grover was not error on the court's part. Absent a strong showing of bad faith or improper behavior, a court need not and may not inquire into the mental processes of a governmental agency or its members. *Citizens to Preserve Overton Park*

v. Volpe, 401 U.S. 402, 420 (1971); *United States v. Morgan*, 313 U.S. 409, 422 (1941). In addition, affidavits before the court established that one or more of Superintendent's decisions in Daniel's case had been made by his deputy, Dean Bowles, and that all decisions were based solely on the record. Therefore, neither Bowles nor Dr. Grover would have had independent personal knowledge of the case, and their testimony was not necessary for the court to review the adequacy of the placement options offered to Daniel or the procedures used by the local defendants.

At several places in their brief and in the reply brief, plaintiffs state that they were deprived of their right to have free legal counsel to represent them. This argument is addressed as it applies to the hearing conducted by the district court, although the status of this claim is the same with respect to their appearances at the administrative level. The EAHCA does not require that children covered by its provisions, or parents who initiate action on their children's behalf, be provided with free legal assistance if they are unable or unwilling to obtain counsel on their own. In the earlier portion of the case (involving Count III) the plaintiffs relied on case law governing indigent criminal defendants who face the possibility of incarceration. No new authority for their claimed right to have council is presented in this appeal.

For the reasons stated above, the arguments raised on appeal by the plaintiffs are rejected by this court, and the decisions of the district court that, taken together, decide all issues alleged in the amended complaint are

AFFIRMED.[1]

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[1] The local defendants filed a motion to strike non-record portions of a third appendix volume submitted by plaintiffs. This motion was held in abeyance pending the outcome of a motion to be presented to the district court to supplement the record on appeal with materials objected to by defendants. On March 20, 1985, the district court denied that motion, holding that some of the material was already a part of the record and that some was material that was never before the court in trial of the matter. Plaintiffs have not filed any response to this ruling, although directed to do so within five days of the decision of the district court. Consequently, local defendants' motion to strike non-record portions of the appendix is GRANTED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 83-C-1534

DANIEL B and his parents
MR. AND MRS. B,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, HERBERT GROVER, THE GLENDALE-RIVER HILLS SCHOOL BOARD OF EDUCATION DISTRICT NO. 1, JOHN BELTON, ROBERT KATTMAN, EDWIN HILL, and JOSEPH AMATO,

Defendants.

DECISION and ORDER

With one exception, all Counts in the Amended Complaint in this case were dismissed in a written Decision filed on March 5, 1984. Count One, the sole survivor, was before me at a hearing that concluded on May 1, 1984. After the hearing, I took the matter under advisement. The parties were invited to submit written arguments which, together with the voluminous file already compiled in this case, have been reviewed. The following constitutes my decision on the remaining Count.

An emotionally disturbed and disabled boy, Daniel B, and his parents (who have abbreviated their names in order to conceal their identity), brought this action to obtain relief from a decision of the Wisconsin Superintendent of Public Instruction. The decision concerns Daniel's placement in a special educational program. Originally, they sought such things as monetary

damages for certain actions taken by the Superintendent and other defendants which, in their view, constituted bad-faith violations of federal and state laws providing for free, appropriate special education for handicapped children. They also claimed constitutional deprivations of due process, intentional misrepresentation, intentional infliction of emotional distress, and invasion of privacy. Only the validity of the decision of the Superintendent of Public Instruction remains. The appeal of Daniel's placement is under the Education For All Handicapped Children Act of 1975, 20 U.S.C. 1401, *et seq.*

One cannot help but admire the dogged determination with which Mr. and Mrs. B have fought for what they truly think is best for Daniel. It is, I believe, a testimonial to the love that they have for their child. If perseverance were the key to victory in this case, they would surely win.

While the persistence of the B's is noteworthy, it has a dark side. Their vigorous efforts have, in my view, clouded their perception of others who have looked at Daniel and concluded that a course or program not of the parents' liking is appropriate. The B's seem to see those who disagree with them as members of some conspiracy bent on ruining their son and causing them unnecessary pain and anguish. I do not see their "opponents" this way, and the fact that the B's do is one unfortunate aspect of this very unfortunate case.

FACTS

Daniel was born on July 4, 1969. At all relevant times, he has lived in the Glendale-River Hills School District. From early on, Daniel has been a child with exceptional educational needs as that term is defined in § 115.76 of the Wisconsin Statutes.

Mr. and Mrs. B first enrolled Daniel in the District schools in 1976. Since then, because of their frequent dissatisfaction with District placements, Daniel has been educated in no fewer than nine different educational settings.

On July 20, 1982, Mr. and Mrs. B formally challenged the District's placement of their son for the 1982-83 school year. The year before, Daniel had attended Jackie Robinson School in the City of Milwaukee. The parents and the District had tentatively agreed that Daniel would return there the following year. During the 1982 summer vacation, however, Mr. and Mrs. B initiated an appeal of the District's placement of Daniel at Jackie Robinson, pursuant to Wis. Stats. § 115.81 (4M). Dr. C. Stuart Robertshaw was appointed as the independent hearing officer, an independent evaluation of Daniel was undertaken, and an extensive hearing was held. Following the hearing, Dr. Robertshaw issued a decision containing the following pertinent findings:

> 6. Daniel was making some education progress during the 1981-82 school year [at Robinson].
>
> . . .
>
> 7. At the time of the May 5, 1982 I.E.P. [Individualized Educational Program] Conference, in which [Mr. and Mrs. B] were in attendance, [Mr. B] agreed that Daniel would remain at the Jackie Robinson School for the next academic year.
>
> . . .
>
> 9. On July 17, 1982, the educational staff had been under the impression that [Mr. and Mrs. B] were in full support of Daniel's continued placement at Jackie Robinson School for the 1982-83 school year. On July 19, 1982, the school district received a letter from [Mr. B] which indicated that: The summer program had failed, and Daniel was "regressing"; the only thing appropriate about the placement at Jackie Robinson School was the teacher; and that Daniel had not been educated

since his placement at Highland Bluff (1975-77). The hearing officer found [sic] that there was little indication, prior to the July 19 letter, that the parents were not in support of the continued placement at Jackie Robinson School. Further, the hearing officer finds that a series of behavior changes in Daniel which occurred while Daniel was enrolled in the summer program with the Milwaukee Public School system, triggered the July 19 letter of dissatisfaction with the Jackie Robinson placement.

10. [Mr. and Mrs. B] have not permitted Daniel to attend Jackie Robinson School during the 1982-83 school year on the basis that they judged such continued placement to be harmful to Daniel. The hearing officer finds that the testimony and exhibits presented at the hearing do not support a conclusion that continued placement at Jackie Robinson School would have been harmful to Daniel.

. . .

13. All appropriate procedures were followed with regard to Daniel's placement at Jackie Robinson School during the 1981-82 academic year.

14. All procedural prerequisites for continuing Daniel's placement for the 1982-83 academic year have been satisifed.

15. The proposed I.E.P. for the 1982-83 academic year incorporated most of the recommendations of the Independent Evaluation Team. Contingent upon:

(a) the fact that the activities are to take place in meaningful context and not in isolation unrelated to life situations, and

(b) that approximately 30% to 50% of Daniel's instruction will occur in non-school environments.

The hearing officer finds that the proposed I.E.P. is appropriate.

Despite finding that Daniel's I.E.P. was appropriate and that he had made progress at Jackie Robinson, Dr. Robertshaw found the placement to be "inappropriate." He did so primarily because he thought Daniel needed to be educated in the community in which he lived — Glendale — and not in the City of Milwaukee, where Jackie Robinson is located. Dr. Robertshaw also found that Daniel did not need a residential placement. Dr. Robertshaw ordered that "Daniel [B] . . . be offered a program consistent with this opinion at the Middle School in Glendale, Wisconsin."

Upon receiving the order, the District offered three different placements to Mr. and Mrs. B: Robinson, Glen Hills (the middle school in Glendale) and Bayside (a school in a nearby community). Mr. B rejected the three proposed placements, and both the District and Mr. and Mrs. B appealed the Robertshaw decision to Dr. Herbert Grover, State Superintendent of Schools. On August 2, 1983, Dr. Grover reversed the Robertshaw decision. He found:

> In the appeal before me, the hearing record amply demonstrates, and the hearing officer found, that all procedural requirements of state and federal law had been met by the district and that the Jackie Robinson School placement would provide Daniel [B] with substantial specialized instruction and related services, and would enable him to receive educational benefits. In short, as the *amicus curiae* suggested, the record and the hearing officer's findings of fact "reflect textbook compliance with federal law".
>
> The school district has also argued that the reasons given by the hearing officer in support of his conclusion that Jackie Robinson is not an appropriate placement for the implementation of the proposed I.E.P. do not support that conclusion. We agree. The

first reason given is that Daniel is 13 years old, has been educated in nine different educational settings in eight years and has been exposed to a variety of instructional strategies and a variety of educational personnel with minimal educational and social development. While true, these facts provide no basis for concluding that Jackie Robinson is an inappropriate placement. Everyone involved with Daniel agreed that Daniel required stability in his educational program, and a continued placement at Jackie Robinson would have been the first time he had remained for more than one school year in the same setting. In addition, Daniel had made significant progress in the short time he had been enrolled at Jackie Robinson, had developed a good and close relationship with his teacher and the aide, and had greatly increased his involvement with his classmates. The testimony also indicated that the progress was likely to continue and could improve greatly if the parents would cooperate with the teacher and support Daniel's program.

The second reason given by the hearing officer is that Daniel's learning characteristics, including his difficulty in transferring what he learns, his learning rate variability, and the necessity to teach skills and provide knowledge in a meaningful context show that Jackie Robinson is inappropriate. The hearing officer made no attempt to explain why the Jackie Robinson placement could not address these concerns. We have been unable to find anything in the record that would support those conclusions. However, these concerns are specifically addressed in Daniel's I.E.P. and the record explicitly establishes that these concerns were addressed by the placement officer when she chose the Jackie Robinson program for Daniel.

The third reason given by Dr. Robertshaw for rejecting the Jackie Robinson placement is that Daniel needs a placement in his neighborhood school. The hearing officer relied on the testimony of

> Independent Evaluation Team members . . . in reaching this conclusion, even though he acknowledged that they were "predisposed to recommending a program in 'close temporal and geographic proximity' to Daniel [B's] residence." There is no indication that the hearing officer paid any attention to the statutory requirements of state and federal law regarding the school district's choice of a location to provide Daniel's program . . . .
>
> None of the reasons given by the hearing officer, either separately or together, support his conclusion that Jackie Robinson school is not an appropriate placement and must be rejected in view of his findings, which are fully supported by the record, that Daniel's I.E.P. can be implemented at Jackie Robinson, and that Daniel would derive substantial benefit from that placement.

Mr. and Mrs. B have appealed Dr. Grover's reversal of the Robertshaw decision pursuant to 20 U.S.C. § 1415(3)(2), which provides that "any party aggrieved by the findings and decision [by a state agency] shall have the right to bring a civil action . . . in a district court of the United States . . . ."

DISCUSSION

The only issue before me is the review of Dr. Grover's reversal of the Hearing Examiner's decision regarding the appropriateness of Daniel's 1982-83 placement at Jackie Robinson School.

The Education For All Handicapped Children Act of 1975 provides federal funding to assist local and state agencies in furnishing handicapped children with a "free appropriate public education." Federal funding is contingent upon a state's compliance with specific procedures designed to effectuate appropriate handicapped education. Wisconsin statutes and regulations on

handicapped education (Wis. Stats. § 115.81 *et seq.*; Wisconsin Administrative Code Ch. PI 11) qualify the state to receive federal funds and require it to abide by the procedures and standards set by the Act.

The parties in this case, not surprisingly, disagree about the scope of review under the Act. The Act provides that:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. 20 U.S.C. § 1415 (e)(2).

In *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court outlined the scope of review under the Act. The Supreme Court held that district courts (state courts also for that matter) are not free

> to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an I.E.P. would be frustrated if a court were permitted simply to set state decisions at nought. The fact that section 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. *Rowley* at 206.

Therefore, while I am required to "make an 'independent decision based on a preponderance of the evidence,' " I must "be careful to avoid imposing [my] view of preferable educational methods" upon the defendants. *Rowley* at 205, 207.

The parties also disagree about the substantive standard required by the Act. The *Rowley* Court also addressed this question, concluding that the Act did not require maximization of the "potential of each handicapped child commensurate with the opportunity provided non-handicapped children." *Rowley* at 200. The Court explained:

> Desirable though that goal might be, it is not the standard that Congress imposed upon states which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. *Id.*

The Court concluded that:

> Insofar as a state is required to provide a handicapped child with a "free appropriate public education," we hold that *it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.* *Rowley* at 203 (emphasis added).

The B's argue that Wisconsin sets a higher standard than that of the Act and that I am therefore required to go beyond the language of *Rowley* in deciding this case. They base their argument on Wis. Stats. § 115.76(3), which defines "child with exceptional educational needs" as any child who has a mental, physical, emotional or learning disability which, "if the full potential of the child is to be attained, requires educational services to the child to supplement or replace regular education." However, this reference to "the full potential of the child" only defines a particular group of children who qualify for special educational services; it does not set a substantive standard for those services. The substantive standard for special education is found in §§ 115.85(1)

(a) (1) and (2), which provide that "[e]ach school district shall ensure that appropriate special education programs are available to children with exceptional educational needs . . . ", and "shall place in an appropriate special education program a child who has been recommended for special education . . . ." The standard is therefore one of "appropriateness," the same standard as that of the Act. The *Rowley* limitations on the nature of this review, therefore, are not altered by state law.

The Court in *Rowley* condensed the focus of review into two questions:

> . . . A court's inquiry in suits brought under section 1415(e)(2) is twofold. *First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?* If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more. *Rowley* at 206-207 (footnotes omitted) (emphasis added).

For the reasons stated below, I find that the defendants have complied with the procedures set forth in the Act, and that Daniel's I.E.P. is reasonably calculated to enable him to receive educational benefits.

Both Dr. Robertshaw and Dr. Grover found that all procedural requirements had been met with regard to Daniel's placement at Jackie Robinson in 1981-82 and his continuing placement there for the 1982-83 school year. The only evidence the B's offer to contradict these findings is a report by the Office of Civil Rights (OCR) issued in response to a complaint by the B's. However, the OCR specifically stated that it was not addressing the appropriateness of the Robinson placement in its report:

> The issue of Daniel's current placement recommendation regarding whether or not it can satisfy the I.E.P. terms is not a part of this complaint and is the subject of Federal Court litigation. Thus, we are not addressing the appropriateness of the district's recommendation placement at Robinson School. Ex. 4 at 10.

The only findings in the OCR report related to this litigation are those dealing with Daniel's I.E.P., and a June 10, 1981 multi-disciplinary team evaluation [M-Team] that led to his original placement at Jackie Robinson. The OCR found both the I.E.P. and the M-Team procedurally correct.

The primary purpose, of course, for insisting on compliance with the procedural aspects of the law is that they insure a measure of participation by parents and guardians in the process. From this participation, a more just and appropriate I.E.P., it is hoped, will flow. If anything can be said about this case, it is this: the B's have certainly been active participants in the process. Unfortunately, the desired result of adherence to the procedural safeguards, i.e., a just resolution, has not, as far as they are concerned, been realized.

There being no evidence in the record to undermine the findings of the hearing examiner and the State Superintendent, they will be upheld. I find that the defendants have met all procedural requirements under the Act.

Drs. Robertshaw and Grover also found that Daniel's I.E.P. was appropriate. None of the educational experts who testified questioned the fundamental adequacy of the I.E.P.; what difference of opinion existed pertained to the place at which that I.E.P. was to be implemented. The B's object not so much to the I.E.P. itself but to the

fact that some of their suggestions were not incorporated into it. This does not render the I.E.P. inappropriate.

The real dispute here is over the location at which the I.E.P. is to be carried out. The District has offered five different placements: Robinson, Glen Hills, Bayside, Wisconsin Hills and Pleasant View. Mr. B has asked the district to pay for his son's education at Brown School in Texas, a residential school for the handicapped. Mrs. B expressed a preference for Concordia Special School in Mequon, a Lutheran affiliated school. As I read *Rowley* as applied to this case, I need not decide which placement is best for Daniel, but only whether any of the offered placements will provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley* at 203. For the reasons outlined below, I find that each of the five placements offered by the District are appropriate.

Jackie Robinson — Dr. Robertshaw's findings largely support the conclusion that Jackie Robinson remains an appropriate placement for Daniel under the *Rowley* standard. He found that Daniel was making some educational progress during his year at Jackie Robinson, and that the school was not, as the B's contended, harmful to Daniel. He also found that the I.E.P. implemented at Jackie Robinson would provide substantial specialized instruction and related services. This, coupled with the procedural correctness of the District's actions, satisfies the *Rowley* criteria for appropriateness under the Act. I agree with Dr. Grover's assessment of the hearing examiner's reasons for finding Jackie Robinson inappropppriate: none of the reasons, separately or together, support a conclusion of inappropriateness given

the fact that Daniel was making progress at the school and that the school was equipped to provide him with the substantial specialized instruction he needs. Nothing in the record substantially contradicts the conclusion of the District's specialists that Daniel's I.E.P. can be successfully implemented at Jackie Robinson with some cooperation from the parents. I recognize that the B's strongly dislike the school and that therefore parental cooperation may not be forthcoming. Their dislike, however, does not make Jackie Robinson inappropriate under the *Rowley* standard.

Glen Hills — Dr. Robertshaw ordered that Daniel's I.E.P. be implemented at Glen Hills Middle School, Daniel's local school. The District's Special Education staff offered to do so. There is no evidence in the record that Glen Hills would be an inappropriate placement for Daniel were his I.E.P. to be implemented there. The B's objection to Glen Hills is primarily that the Special Education Program there is not now appropriate. This has been acknowledged by the District. That is not to say that it could not become appropriate. According to the testimony of the District Special Education personnel, if the B's would accept the placement, the District would create a program at Glen Hills consistent with Daniel's I.E.P., as it would be required to do by law. Consequently, if Daniel's I.E.P. were implemented at Glen Hills, it would be an appropriate placement under the *Rowley* standard.

Bayside School — As with Glen Hills, the B's primary objection to the Bayside School is that the program is not now appropriate for Daniel. But again, if the B's were to accept this placement, the District would create an appropriate program consistent with Daniel's I.E.P.

There is no evidence in the record that the Bayside School would not be appropriate if Daniel's I.E.P. were implemented there.

Wisconsin Hills — The B's first objection to the Wisconsin Hills placement is that it is too far from Daniel's home. Wisconsin Hills is in the Elmbrook School District on the west side of the Milwaukee metropolitan area; Daniel's home in Glendale is on the north side of the Milwaukee metropolitan area. While distance is a factor in the placement decision, it is not so important, when the distance is not great, as to override an otherwise appropriate school. Furthermore, Dorothy Lingren, the Placement Officer for the North Shore Exceptional Education Cooperative [NSEEC], which serves the District, testified that the bus ride to Wisconsin Hills would not be "a great factor," particularly because Daniel would be traveling with two other handicapped students from the North Shore.

The B's second objection to the Wisconsin Hills placement is that it is a self-contained, handicapped-only program. Testimony from several special education professionals indicated that, as a general rule, a non-segregated environment is preferable to a segregated one. However, this testimony reflected an inherent bias against handicapped-only programs, and not a specific conclusion that such a program would prevent Daniel from learning[1]. On the contrary, the experts who were familiar with the placements offered by the district spoke highly of Wisconsin Hills. In fact, Ms. Lingren testified that the significant support services and age appropriate peers available at Wisconsin Hills make it currently the best placement for Daniel. She also testified that Wisconsin Hills could fulfill Daniel's need for stability — which all the experts agreed was significant — since he could

[1] See App. 27

remain there until age 21. (In the non-segregated programs he would have only one or two years before moving into the area high school.) The evidence strongly supports the appropriateness of Wisconsin Hills.

Pleasant View — Like Wisconsin Hills, Pleasant View is a handicapped only, non-neighborhood placement. Beyond this, the evidence supports the programs' appropriateness. For the reasons stated above, these factors, individually or together, do not defeat the program's appropriateness.

Having found that the five placements offered by the District are appropriate, I must find that Brown School in Texas and Concordia Special School in Mequon are not permissible placements under the applicable statutes. Wisconsin Statute § 115.85(2) (d) allows a private school placement only "if no equivalent public program is available." Since appropriate public programs are available, the District may not lawfully offer either private program. Concordia would not be a permissible placement for the additional reason that it is religious affiliated and teaches religion as a part of its curriculum, a practice prohibited by Wis. Stats. § 115.85(2) (d).

After the hearing, Mr. and Mrs. B filed additional motions demanding judgment against the defendant Wisconsin Department of Public Instruction and damages in the form of reimbursement for the costs they incurred in sending Daniel to St. Mary's Hill Hospital and Concordia Special School. The B's demand judgment against the Wisconsin Department of Public Instruction on the ground that the Department elected not to file a post-hearing brief but to stand on the arguments made by the District in its post-hearing brief. Election not to file a post-hearing brief does not constitute grounds for

judgment against the Department. The B's claim for damages, furthermore, was dismissed by my Decision of March 5, 1984. For these reasons, both motions are DENIED.

CONCLUSION

For the foregoing reasons, I find that the District's five offered placements are appropriate under the *Rowley* standard. Accordingly, judgment is entered for the defendants and the Amended Complaint is DISMISSED.

SO ORDERED at Milwaukee, Wisconsin, this 27 day of July, 1984.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

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[1] This excerpt from the April 30, 1984, hearing is illustrative:

> DR. LOUIS BROWN: Well, first of all, from what you described and from what I know of Pleasant View School [like Wisconsin Hills, a segregated school], it's a segregated school. Only handicapped children go there. And, therein, I think it would be unacceptable to put Daniel for the next six years in a handicapped only environment.
>
> THE COURT: Is it your opinion that every child at that school is inappropriately placed?
>
> THE WITNESS: Well, I would, again, I would have to, I would think if there was something there that they could get that they could not get in a regular school, then I would say let's put them there. But I have yet to meet a severely handicapped child that could not benefit with the interactions with normal people.

Tr. at 30-31.

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1230

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

DANIEL B. and MR. and MRS. B.,

Petitioners,

-vs-

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, et al.,

Respondents.

BRIEF AND APPENDIX OF LOCAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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26pp

ISSUES PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Seventh Circuit err in affirming the District Court for the Eastern District of Wisconsin's denial of the appointment of counsel or the payment of attorneys' fees in a civil action brought pursuant to 20 U.S.C. §1401, et seq?

2. Did the United States Court of Appeals for the Seventh Circuit err in affirming the dismissal of petitioners' complaint by the District Court for the Eastern District of Wisconsin?

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No. 85-1230

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

DANIEL B. and MR. and MRS. B.,

Petitioners,

-vs-

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, et al.,

Respondents.

BRIEF OF LOCAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, Daniel B. (a handicapped child) and his parents, Mr. and Mrs. B., commenced this action on August 30, 1983, against the Wisconsin Department of Public Instruction, one of Daniel's teachers, Joseph Amato, and the local school district (Glendale-River Hills School District Joint No. 1 ("Glendale-River Hills")), two of its administrators (Dr. John R. Belton and Dr. Robert J. Kattman), and one of its agents (Mr. Edwin Hill) (hereafter "Local Respondents"). The following six causes of action were asserted:

(I) The educational plans for Daniel for the 1982-83 school year were inappropriate and the hearings held on those plans were defective in that Daniel's parents were refused legal counsel and were required to furnish legal briefs.

(II) Daniel was denied a free appropriate public education and adequate remedial education from 1976 through 1981, in violation of 20 U.S.C. § 1401, et seq., and Chapter 115, Wis. Stats.

(III) Petitioners' constitutional rights of due process of law and equal protection of the law were violated contrary to 42 U.S.C. § 1983.

(IV) Respondents' actions constituted intentional misrepresentation to Daniel's parents and negligent and intentional infliction of emotional distress to Daniel.

(V) Confidential information about Daniel's identity and the nature of his handicap was disclosed in violation of 20 U.S.C. § 1232, et seq., and § 895.50, Wis. Stats.

(VI) There had been an "egregious and bad faith failure to afford Daniel the procedural safeguards of federal and state law."

Compensatory and punitive damages were sought for Counts III through VI, and injunctive and declaratory relief was requested for Counts I and II.

The respondents moved to dismiss all of the amended complaint except Count I. The trial court granted the motion in its entirety on March 5, 1984. See Daniel B. v. Wisconsin Department of Public Instruction, 581 F. Supp. 585 (E.D. Wis. 1984) (see Respondents' Appendix A).

An evidentiary hearing on Count I was held on April 30 and March 1, 1984. Following post-hearing briefing, the trial court found each of the five different educational placements offered for the 1982-83 and 1983-84 school years to be appropriate. Count I was then dismissed.

Petitioners appealed the dismissal of Counts II through VI of their amended complaint, and further asserted that the trial court's ruling on Count I was in error. The United States Court of Appeals for the Seventh Circuit affirmed the trial court's decision in all respects in an unpublished decision dated October 24, 1985.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR DECISIONS OF OTHER FEDERAL COURTS OF APPEALS, NOR DOES IT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; THEREFORE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A review on writ of certiorari is not a matter of right. It will be granted only when there are "special and important reasons." Sup.Ct.R. 17.1. Among the reasons considered are:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . .
>
> * * *
>
> (c) When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup.Ct.R. 17.1. Although petitioners have not discussed the application of these standards in their petition, no decision of other federal courts of appeals are cited and therefore subsection (a) of Rule 17 is inapplicable. Similarly, because the Seventh Circuit's decision involves neither (1) a federal question decided in a way which is conflicting with this Court's prior decisions or (2) an important question of federal law that has not been settled, this petition should be denied.

A. Petitioners' Contention that They Are Entitled to Counsel or Payment of Attorneys' Fees as a Matter of Constitutional Right Is not a Novel Issue and Does not Warrant the Granting of the Petition.

Petitioners contend the Fifth Amendment to the United States Constitution entitles them to an appointment of counsel or the payment of attorneys' fees as an element of due process in an action brought pursuant to 20 U.S.C. § 1401, et seq. They contend that this is a question not previously addressed. However, this question has been addressed and rejected by operation of long-standing principles dealing with attorneys and attorneys' fees.

In Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), reh'g denied, 613 F.2d 314 (5th Cir.), cert. denied, 449 U.S. 820 (1980), the United States Court of Appeals for the Fifth Circuit recognized that while a "civil litigant's right to retain counsel is rooted in Fifth Amendment notions of due process; the right does not require the government to provide lawyers for litigants in civil matters." Id. at 1118 (citing Hullom v. Burrows, 266 F.2d 547 (6th Cir.), cert. denied, 361 U.S. 919 (1959); McGaughy v. Gardner, 296 F. Supp. 33, 36 (E.D. La. 1967)).

Furthermore, this Court has recognized on several occasions that the basic elements of constitutional due process include notice and the opportunity to be heard. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970). Petitioners were undeniably afforded these protections, as evidenced by the lengthy procedural history of this case.

In addition, this Court has held that "absent statute or enforceable contract, litigants pay their own attorneys' fees." Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 257 (1975). In accordance with this principle, the decision of Smith v. Robinson, 104 S. Ct. 3457 (1984), removed all doubt concerning the availability of attorneys' fees in actions brought pursuant to the Education For All Handicapped Children Act (EAHCA). In that case, certiorari was granted "[b]ecause of confusion in the circuits over the proper interplay among the various statutory and constitutional bases for relief in cases of this nature and over the effect of that interplay on the provision of attorneys' fees." Id. at 3465. In

Smith, this Court recognized the EAHCA's silence regarding the availability of attorneys' fees and held that the petitioners were not entitled to circumvent this Congressional mandate by attempting to come under the attorneys' fees provisions of either 42 U.S.C. § 1988 or § 505 of the Rehabilitation Act.

The unavailability of attorneys' fees in an EAHCA action is also consistent with this Court's reasoning in Harris v. McRae, 448 U.S. 297 (1980). There, a pregnant woman claimed an entitlement to government funding for an abortion as a matter of due process. This Court held:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.

Id. at 317-18. Likewise, the due process clause grants petitioners the right to retain and be represented by counsel, but it does not entitle them to government funding of that right.

Petitioners assert that the Seventh Circuit erroneously distinguished authority presented in support of their argument for the appointment of counsel as "'case law governing indigent criminal defendants who face the possibility of incarceration.'" In support of this assertion, petitioners cite the cases of Gideon v. Wainwright, 372 U.S. 335 (1963), Johnson v. Zerbst, 304 U.S. 458 (1938), and Powell v. Alabama, 287 U.S. 45 (1932). An analysis of these cases demonstrates that the Court of Appeals did not err in distinguishing them.

Gideon v. Wainwright held it was error for the trial court to delay court-appointed counsel to an indigent defendant. Id. at 345. Likewise, Johnson v. Zerbst recognized the Sixth Amendment right to the assistance of counsel at a criminal trial in federal court. 304 U.S. at 462. Finally, Powell v. Alabama involved the right to counsel when charged with a capital offense. The Powell holding was specifically limited to the facts of that case. 287 U.S. at 71.

Given the civil nature of petitioners' suit, the court of appeals appropriately distinguished the cases cited on that basis.

The granting of certiorari is therefore not warranted in this case. There is no novel question previously unaddressed and the Seventh Circuit's decision is not in conflict with applicable decisions.

B. The Court of Appeals Correctly Dismissed all Counts of Petitioners' Complaint and Used Reasoning Fully Consistent with Applicable Decisions of this Court.

Petitioners next contend that the Seventh Circuit's affirmance of the trial court's dismissal of the complaint was based on petitioners' failure to exhaust administrative remedies. This contention is misleading and without merit.

The only portion of petitioners' complaint that was dismissed for failure to exhaust administrative remedies was Count II — the claim alleging inappropriate educational services for 1976 through 1981. The Court of Appeals affirmed this dismissal relying upon Timms v. Metropolitan School District, 722 F.2d 1310, 1316 (7th Cir. 1983), and the fact that petitioners presented "no convincing argument to establish that efforts to obtain administrative review would have been futile in this case." (Petitioners' Appendix at 5; hereinafter "P.App.__"). The necessity of administrative exhaustion was recognized by this Court in Smith v. Robinson, 104 S. Ct. 3457, 3468, 3470 (1984).

Counts I and III-VI were not, as petitioners contend, dismissed for failure to exhaust administrative remedies. Rather, these counts were either dismissed on their merits or on pendent jurisdiction grounds.

After an evidentiary hearing on Count I, the trial court dismissed it by holding that the educational placements offered by the Local Respondents were appropriate under the standards set forth in Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982).

Count III alleged a deprivation of constitutional rights in violation of 42 U.S.C. § 1983. Its dismissal was therefore appropriate under this Court's holding in Smith v. Robinson, 104 S. Ct. at 3466-71.

Count IV and most of Count V sought monetary damages for state tort claims over which the federal district court refused to exercise pendent jurisdiction. This decision falls within the sound discretion of the trial court, see United Mine Workers v. Gibbs, 383 U.S. 715 (1966), and the Court of Appeals concluded there was no abuse of that court's discretion (P.App. 6).

The remainder of Count V, alleging a violation of the Family Educational Rights of Privacy Act, 20 U.S.C. § 1232, et seq., was dismissed "because that Act does not provide a private damage remedy and the only relief requested in Count V was a total of one million dollars in damages." (P.App. 6). This ruling was not challenged on appeal.

Count VI requested monetary damages for a violation of the EAHCA. This count, too, was dismissed on its merits due to the general unavailability of monetary damages for EAHCA violations (P.App. 6-8).

Therefore, all counts of petitioners' complaint except Count II were dismissed on their merits or because discretionary jurisdiction was not exercised. The failure to exhaust administrative remedies was the basis for dismissing only Count II, and this dismissal is based upon the exhaustion requirement emanating from this Court's and lower federal courts' decisions.

Petitioners' final contention, that the materials submitted to the administrative agencies were not read, is wholly unsupported. Petitioners have failed to set forth any factual basis for this presumption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied in all respects.

Dated: February 20, 1986.

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209 424 WDPI

APPENDIX

APPENDIX

DANIEL B and his parents Mr. and Mrs. B,
Plaintiffs,

-vs-

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,
Herbert Grover, The Glendale-River Hills
School Board of Education District No. 1,
John Belton, Robert Kattman, Edwin Hill, and Joseph Amato,
Defendants.

Civ. A. No. 83-C-1534.

United States District Court
E.D. Wisconsin.

March 5, 1984.

DECISION AND ORDER

TERENCE T. EVANS, District Judge.

An emotionally disturbed and disabled boy, Daniel B, and his parents (who have abbreviated their names in order to conceal their identity) have brought this action to obtain relief from a decision of the Wisconsin Superintendent of Public Instruction. The decision concerns Daniel's placement in a special educational program. They also seek monetary damages for certain actions taken by the Superintendent and other defendants which allegedly constitute bad-faith violations of the federal and state laws providing for free, appropriate special education for handicapped children, constitutional deprivations of due process, intentional misrepresentation, intentional infliction of emotional distress, and invasion of privacy.

The case is before me on the defendants' motion to dismiss all except the first count of the complaint. For the reasons stated below, the motion is granted.

FACTS

The following facts, essentially lifted from the Amended Complaint, are accepted as true for purposes of the pending motion to dismiss. Daniel is a 14-year-old student who lives in the Glendale-River Hills School District. He has been identified as a handicapped student by the school district. He has exhibited exceptional educational needs from his first contact with the school system. Because of his special needs, his parents enrolled him in a private school between 1975 and 1976. The plaintiffs claim that during this period, Daniel made steady and regular progress in both emotional and educational development.

John Belton, one of the defendants, is the Administrator and Superintendent of Schools in the school district. Beginning in 1975, Belton attempted to persuade Daniel's parents to withdraw him from the private school and enroll him in a public school within the district. Belton represented to Daniel's parents that the district had better facilities and personnel to provide an individual program for Daniel. Relying upon these representations, Daniel's parents enrolled him in the district schools in 1976.

In the years that followed, the plaintiffs contend, the defendants failed to provide appropriately for Daniel's educational needs. Furthermore, the plaintiffs claim that Daniel's condition actually worsened. He was subjected to physical and emotional abuse. He regressed to a state of semi-autism, became a recluse and developed deformed feet and hands. Plaintiffs contend that Daniel's educational needs have now been abandoned altogether.

Among other allegations which they make are that they had to pay $15,000 to a local hospital in order to obtain the diagnostic evaluation which revealed the deficiencies of which they complain; that the defendants misrepresented to them that a teacher designated to oversee Daniel's education was a certified special education teacher; and that the defendants refused to permit Daniel's parents to observe his classroom conditions or to furnish information concerning him.

Although Daniel's parents objected frequently during the course of these years, they did not formally challenge his particular placement and individual educational program until the 1982-1983 school year. For this year, and this year only, Daniel's parents pursued administrative relief as set forth in Chapter 115 of the Wisconsin

Statutes. A Hearing Officer reviewed Daniel's proprosed program and claimed that it was inappropriate for him. (Despite the favorable outcome, Daniel's parents challenge the hearing itself on the grounds that they were required to act as their own legal counsel.) The Hearing Officer's findings were appealed to the Wisconsin Superintendent of Public Instruction, Herbert G. Grover, who reversed the decision. His decision was issued, the plaintiffs contend "at least 7 months late". The plaintiffs claim that because of the alleged untimeliness of the decision, no educational program has been prepared or implemented for Daniel for the 1983-1984 school year.

The plaintiffs also attack Belton for disclosing Daniel's identity and the nature and extent of his emotional handicap, claiming this to be an invasion of their privacy.

DISCUSSION

1. Count I.

The plaintiffs' claim most urgently in need of immediate attention is described in ¶ 35 of the complaint; it asserts that Superintendent Grover's decision governing Daniel's placement during the 1982-83 school year, along with the effect that decision had on Daniel's education during the 1983-84 school year, is reviewable by me and the decision itself was "erroneous, arbitrary and capricious and contrary to the facts and the law." They seek judicial review of Grover's decision and declaratory and injunctive relief reversing the decision.

The federal statute under which the plaintiffs seek relief is the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1401, et seq. EAHCA represents federal efforts to ensure that state school systems will provide the most appropriate special education to the widest possible number of disabled students who need them. The special efforts which states are required to undertake in implementing EAHCA (on the threat of losing federal education funds) are reflected in § 115.76, et seq., Wis. Stats.

It appears from the submissions of the defendants that this claim is not contested as part of the motion to dismiss. Instead, the defendants have aimed their attack at other features of the plaintiffs'

case. Thus, the defendants appear to concede that Count I is well pleaded and appropriately before this court for determination.

2. Count II.

In Count II, the plaintiffs expand their request for declaratory relief beyond the decisions made with respect to the 1982-83 and 1983-84 school year to decisions going back to 1975. What makes the claims asserted in Count I decisively distinct from those made in Count II is that the 1982-83 decision under attack in Count I has been fully reviewed by the appropriate administrative bodies while the earlier decisions have not. Because the plaintiffs have failed to exhaust the administrative remedies provided for them as part of the statutory entitlement under which they seek relief, I must dismiss these claims.

The Court of Appeals for the Second Circuit extensively reviewed EAHCA's procedural scheme in Riley v. Ambach, 668 F.2d 635 (2d Cir. 1981). The court described EAHCA's exhaustion requirement:

> The philosophy of the Education for All Handicapped Children Act is that a plaintiff must first exhaust the state administrative remedies provided under the Act, including the administrative appeals provisions, before bringing an action in federal court that challenges the evaluation and placement of a child. . . .Only when these state administrative remedies have been exhausted may a suit be brought in federal court. 20 U.S.C. § 1415(e)(2).

Id. at 640. Such a philosophy protects several very important interests: the requirement respects the state interest in establishing and maintaining a comprehensive scheme of regulation for state schools. The requirement vests authority over these types of decisions in an expert supervisory body, far more familiar than a federal court with the local factors and educational needs involved in administering special education programs. The requirement insures that if the expert agency cannot resolve the problem itself, the record on which the federal court must decide will be fully and efficiently illuminated for the court's decision. Id. The principles which

the Riley court outlined comport fully with the principles underlying the general doctrine of exhaustion which has long been settled in the jurisprudence of administrative law. See McKart v. United States, 395 U.S. 185, 193-195, 89 S.Ct. 1657, 1662-1663, 23 L.Ed.2d 194 (1969); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-464, 82 L.Ed. 638 (1938).

With respect to the decisions which come under attack in Count II, no such administrative review took place. The plaintiffs contend that they made frequent objections about the way their son was being treated during the years 1975 through 1981, and that his placement received the "tacit approval" of higher authorities. However, their objections have not been investigated or reviewed under the procedures established in § 115.81, Wis. Stats. The kind of probing review which the exhaustion doctrine requires was never undertaken before the 1982-83 school year. For that reason, Count II is dismissed.

3. Count III.

In Count III, the plaintiffs assert that the factual allegations made in ¶¶ 27, 28 and 29 of the complaint amount to deprivations of constitutional rights which are redressable under 42 U.S.C. § 1983. These allegations raise three separate claims which allegedly violate the due process provisions of the Constitution: (1) Daniel's parents were denied information about Daniel's education and the opportunity to observe his education and progress. (2) The defendants failed to notify them of their legal rights and remedies under federal and state law. (3) They were not provided with free legal counsel to represent them at the hearing which was called in order to review Daniel's proposed 1982-83 program, even though the defendants had retained legal counsel paid for by public funds.

The allegations on which Count III is based are not sufficient to state a claim for relief under § 1983. Claims (1) and (2) are insufficient to invoke § 1983 relief because EAHCA itself was intended to be the exclusive remedy for these claims.

With regard to claim (1), 20 U.S.C. § 1414(a)(1)(C)(iii) mandates that states assure that educational programs for handicapped children will include "the participation and consultation of the parents . . . of such children." As for claim (2), § 1415(a) (itself

entitled "Procedural Safeguards") requires that states assure that handicapped children and their parents are "guaranteed procedural safeguards with respect to the provision of free appropriate public education."

Where the Act itself provides the measures necessary to protect the entitlements which it creates, courts have consistently held that plaintiffs may not turn to § 1983 for additional relief. The Court of Appeals for this Circuit gave the Act close scrutiny in Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981). The court ruled that the right to judicial relief for violation of EAHCA is exclusively provided by the Act itself. The court relied on the analysis set forth in Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) and Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), which stated more broadly that § 1983 is not applicable in situations "where the governing statute provides an exclusive remedy for violations of the Act." Id. at 1215, quoting Pennhurst 451 U.S. at 28, 101 S.Ct. at 1545, Thiboutot 448 U.S. at 22 n. 11, 100 S.Ct. at 2514 n. 11.

The court then gave two reasons why the remedy provided by EAHCA is exclusive. First, just like the statutory remedies analyzed in Brown v. GSA, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) (§ 717 of Title VII) and Great American Federal S. & L. Ass'n v. Novotny, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (Title VII), EAHCA contains an elaborate administrative and judicial enforcement system, which includes an express right of action for a party aggrieved under the statute. Second, EAHCA makes available injunctive relief only; the monetary damages which § 1983 provides are inconsistent with this form of remedy. The court wrote:

> EAHCA. . . cannot be given "unimpaired effectiveness" if a section 1983 action is available for EAHCA violations. . .In Adickes v. Kress & Co., 398 U.S. 144, 150-151 n. 5 [90 S.Ct. 1598, 1604-1605 n. 5, 26 L.Ed.2d 142] (1970), the Supreme Court discussed whether a section 1983 cause of action was possible in a case in which the governing statute did not provide damages. . . .The

> Court concluded that it was "very doubtful" that a section 1983 action could be brought because the remedy provided by the [act in question] did not provide for damages and thus was intended to be the "exclusive means of enforcing the Act's rights." 398 U.S. at 150-151. In the case before us we have determined that section 615(e)(2) precludes damages absent exceptional circumstances. Because 42 U.S.C. § 1983 is not similarly limited in scope of the relief it provides, the remedies in the two statutes are inconsistent.

Id. at 1216-1217.

The Court of Appeals reemphasized its conclusion two years later in Doe v. Koger, 710 F.2d 1209 (7th Cir. 1983):

> The Supreme Court in a recent case, Board of Education of the Hendrick Hudson Central School District v. Rowley, [458] U.S. [176] [102 S.Ct. 3034, 73 L.Ed. 2d 690] (1982), discusses EAHCA for the first time. . . . A reading of the broad provisions of the EAHCA in light of the Supreme Court's interpretation inevitably leads to the conclusion that EAHCA itself meets all a parent's needs to assure their children receipt of the benefits of the Act, whether the complaint raises only an Anderson issue, or, as in this case, attackes the procedures themselves.

Id. at 1212-1213.

Since claims (1) and (2) may constitute violations of the Act, the § 1983 claim based on them is dismissed.

Claim (3), described above, is dismissed for a different reason. Claim (3) could state a claim for § 1983 relief only if it alleged a deprivation of a constitutional right. However, I do not believe that the failure to provide free counsel in an EAHCA hearing constitutes a deprivation of constitutional rights. In support of their contentions, the plaintiffs point to the landmark Supreme Court cases of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9

L.Ed.2d 799 (1963) and In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Little more need be said about this argument than that these cases clearly relate to the right to representation by appointed counsel for indigent criminal defendants, both adult and juvenile, where there exists the possibility of incarceration. Thus, the § 1983 claims based on Claim (3), described above, are also dismissed.

4. Count VI.

In Count VI, the plaintiffs seek monetary damages of $5 million for the defendants' "egregious and bad faith failure to afford. . . Daniel. . . the procedural safeguards of federal and state law." Since, as I observed, the EAHCA constitutes the sole source of relief for the injuries which the plaintiffs allege and since EAHCA does not provide for monetary damages, this Count is dismissed.

As indicated above, the Anderson court took pains to determine whether Congress, in empowering district courts to "grant such relief as the court determines is appropriate", 20 U.S.C. § 1415(e)(2), intended to create a monetary remedy for violations of EAHCA. The court analyzed the statutory language, the legislative history and the purposes Congress wished to achieve in legislating on behalf of handicapped children. The court wrote:

> Congress did not envision appropriate relief generally to include a damage remedy. Instead, section 615(e)(2) appears to be the last of many procedural safeguards in a section aimed at insuring proper placements and programs for handicapped children.
>
> . . . . .
>
> In our view, the context makes clear that "appropriate" relief was generally intended to be restricted to injunctive relief, the statutory language giving the district judge wide latitude to fashion an individualized educational program for the child. Neither the statutory language nor the context in which it appears demonstrates a Congressional intent to create any type of educational malpractice action.

Id. at 1210-1211. The Court went on to specifically address the plaintiffs' contention that their due process claims are distinct from claims which might ordinarily relate to the student's educational program itself. The Court noted:

> Plaintiffs contend that a damage remedy is necessary to enforce these due process provisions. The EAHCA, however, already has a built-in mechanism for enforcement. Compliance with the statutory provisions is a prerequisite to the receipt of federal funds. See 20 U.S.C. § 1412.

Id. at 1213 n. 11.

It is true that the Anderson court conceded that there were two exceptions which might make monetary damages appropriate. However, neither of these exceptions applies to this case. First, the court ruled that damages might be appropriate where the placement designed by the state agency posed such "a serious risk of injury to that child's physical health" that it would be necessary for the parents to withdraw the student from the public school system and make alternative arrangements. In that case, the Anderson court authorized district courts "to recompense parents for the costs of those services the school district failed to provide." Id. at 1214. In Count VI, however, Daniel and his parents are not seeking damages merely for the costs they incurred in enrolling Daniel in a private school. Furthermore, a claim that placing Daniel in a private school was a necessary response to the alleged procedural deprivations would fall on account of their failure to exhaust their administrative remedies for the years in which Daniel was enrolled in a private school.

The second exceptional circumstance recognized by the Anderson court exists when the defendants act in bad faith by egregiously failing to comply with the procedural provisions of § 1415. Id. at 1214. I do not believe that Count VI alleges circumstances which warrant money damages under this exception. In the first place, the allegations concerning the alleged inadequacies of Daniel's education prior to the 1982-1983 placement cannot qualify because these claims were never reviewed by the appropriate

administrative body. Id. Indeed, it is ironic that Daniel and his parents are assailing the defendants for failing in bad faith to afford them procedural safeguards when they did not use the safeguards which are a conspicuous part of both Wisconsin and federal law. Furthermore, as a matter of law, the allegations concerning the 1982-1983 placement do not disclose any egregious or bad faith failure to provide the procedural safeguards required in 20 U.S.C. § 1415 or in § 115.81, Wis. Stats.; indeed, the allegations as much as admit that a full hearing was provided and that, furthermore, the Hearing Officer vindicated their position. To the extent that Daniel's complaint arises out of the failure of Superintendent Grover to affirm the Hearing Officer's findings, that is a matter for review of this court which is addressed in Count I. Finally, the Anderson court ruled that the "bad faith" exception justifies a money award only to those parents who have been forced to arrange appropriate services at their own expense, and only for the cost of those services. Id. Since Daniel was not enrolled in an alternative placement during the 1982-83 school year, money damages are not available.

5. Counts IV and V: Claims Arising Under State Law.

Counts IV and V allege violations of the Wisconsin law of intentional misrepresentation, negligence, intentional infliction of emotional distress, and invasion of privacy. These claims must be dismissed for lack of jurisdiction unless I find it appropriate to exercise pendent jurisdiction over them. Because I do not feel that it would be appropriate to exercise pendent jurisdiction over them in this case, they are dismissed. In United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), the Court cautioned lower courts against exercising their powers of pendent jurisdiction in cases similar to this:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate

> to exercise jurisdiction over state claims. . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a sure-footed reading of applicable law.

Id. at 726, 86 S.Ct. at 1139 (footnotes omitted).

In this case, the plaintiffs wish to append damage claims involving complicated state law violations to a simple federal claim for review of a state administrative decision which seeks declaratory and injunctive relief only. Each of these claims requires different forms of adjudication. The federal claim for review will require expedited consideration (in order to assure that if Daniel is improperly placed, a more appropriate placement can be found before his education is further marred), it will be heard by the court rather than a jury, and the compilation of information pertinent to its resolution has already been accomplished. The state claims, on the other hand, will involve a trial to a jury and extensive discovery which does not appear to have been completed. Moreover, they do not involve the same degree of urgency present in the federal claim.

For these reasons, it appears to me that to hitch the state claims to the federal claims may prejudice Daniel's interests rather than protect them. This is especially true to the extent that the plaintiffs' claims raise an allegation of "educational malpractice", an emerging cause of action which is novel in Wisconsin and which has been hotly disputed in other states. See Wilson v. Continental Insurance Co., 87 Wis. 2d 310, 274 N.W.2d 679 (1979) (rejecting educational malpractice claim for mental injury on facts not involving special education for handicapped children); Tubell v. Dade County Public Schools, 419 So.2d 388 (Fla. App. 1982) (dismissing claim that child was wrongfully mistested and misclassified and as a result was improperly placed in a special education program); B.M. v. State, 649 P.2d 425 (Mont. 1982) (recognizing a duty of reasonable care in testing and placing plaintiff in an appropriate special education program). For this reason, I believe it would be a more appropriate use of my discretion to permit the courts of Wisconsin to chart the course of educational

malpractice law. Faced with a similar situation, the district courts in Georgia Association of Retarded Citizens v. McDaniel, 511 F.Supp. 1263, 1283 (N.D. Ga. 1981), aff'd, 716 F.2d 1565 (11th Cir. 1983), and Yaris v. Special School District, 558 F.Supp. 545, 563 (E.D. Mo. 1983) reacted the same way that I will act. EAHCA's foremost interest in prompt resolution of disputes concerning the appropriate educational placement of handicapped children is best served by paring away those state claims which will impede the speedy determination of Daniel's rights.

6. Count V: The FERPA Claim.

Count V also raises an allegation that the defendants breached the plaintiffs' right of privacy under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232, et seq. This claim must be dismissed because FERPA does not provide private litigants with a damage remedy in a federal court. Girardier v. Webster College, 563 F.2d 1267, 1276-77 (8th Cir. 1977). Accordingly, this claim is also dismissed.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss all Counts of the Complaint except number 1 is GRANTED.

IT IS FURTHER ORDERED that a status conference to discuss the method and means by which Count 1 will be resolved will be held on March 22, 1984, at 8:30 a.m.